QUESTIONS PRESENTED

1. Whether the relevant actions of the Republic of Argentina and Banco Central de la Republica Argentina constitute commercial activity within the meaning of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611.

2. If so, whether those actions caused a direct effect in the United States sufficient to confer subject matter jurisdiction over this action pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
SUMMARY OF THE ARGUMENT	11
ARGUMENT	12
I. THE PROMULGATION AND RESCHEDULING OF THE BONODS BY THE ARGENTINE GOVERNMENT PETITIONERS WAS NOT COMMERCIAL ACTIVITY UNDER THE ACT	12
A. There Is No *Per Se* Rule That Issuance Of Debt Is Commercial Activity	14
B. The FSIA Requires That The Sovereign's Conduct Be Analyzed In Context In Order Properly To Determine Its Nature	17
1. The context in which the foreign state's conduct occurs gives meaning to its nature	18
2. Petitioners' relevant actions constitute sovereign conduct	20

PAGE

II. THE FAILURE TO PAY FOREIGN CORPORATIONS IN NEW YORK IS NOT A "DIRECT EFFECT" IN THE UNITED STATES SUFFICIENT TO SUPPORT JURISDICTION UNDER THE ACT 24

A. The Language Of The Act Requires Something More Than A General Effect In This Country Before Jurisdiction Can Be Exercised 26

B. The FSIA Provides For Jurisdiction Based Only Upon A Foreign State's Contacts With The Forum That Are Related To The Cause Of Action 28

C. Nonpayment Of A Debt To Foreign Plaintiffs Is Not A Substantial Forum Contact On Which FSIA Jurisdiction Can Rest ... 29

D. Congress Intended To Place Foreign Sovereigns On An Equal Footing With Private Parties In Terms Of Jurisdiction 32

E. Extension Of The FSIA To Reach Petitioners' Conduct In This Case Would Exceed Constitutional Due Process Limits 35

CONCLUSION 40

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PAGE

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PAGE

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PAGE

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PAGE

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§ 1605(a)(5) 26

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-763

REPUBLIC OF ARGENTINA and BANCO CENTRAL DE LA REPUBLICA ARGENTINA,

Petitioners,

—v.—

WELTOVER, INC., SPRINGDALE ENTERPRISES, INC. and BANK CANTRADE, A.G.

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF REPUBLIC OF ARGENTINA AND BANCO CENTRAL DE LA REPUBLICA ARGENTINA

Petitioners respectfully request that the decision of the United States Court of Appeals for the Second Circuit, entered on August 31, 1991, be reversed for the reasons set forth herein, and that the Complaint in this action be dismissed.[1]

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A at 1a-15a) is reported at 941 F.2d 145 (2d Cir. 1991). The opinion

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1 The caption in this Court contains the names of all parties.

of the district court (Pet. App. B at 16a-29a) is reported at 753 F. Supp. 1201 (S.D.N.Y. 1991).

JURISDICTION

A. The decision of the Court of Appeals for the Second Circuit affirmed an order of the District Court for the Southern District of New York which denied Petitioners' motion to dismiss the complaint for lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act of 1976 (the "FSIA" or the "Act"). Jurisdiction in the court of appeals rested upon the "collateral order doctrine" (Pet. App. A at 2a) (citing *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-47 (1949)).

B. The judgment of the court of appeals was entered on August 13, 1991. The Petition for a Writ of Certiorari was filed on November 8, 1991, and was granted on January 10, 1992.

C. The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Foreign Sovereign Immunities Act provides in relevant part as follows:

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

. . . .

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

§ 1603. Definitions

For purposes of this chapter—

. . . .

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

STATEMENT OF THE CASE

This action arises from the attempt by three foreign entities, with no discernible connection to the United States, to use United States courts to compel the Argentine Government to perform under the terms of certain instruments issued in Argentina in 1982 in connection with implementation of the Government's foreign exchange policies. These instruments, titled Registered Bonds Denominated in United States Dollars—called "Bonods"—raised no capital, and were not used to finance the acquisition of any goods or services. Rather, they were created and issued by the Argentine Government as necessary steps in its administration of the Government's own obligations under a program designed to assure access to foreign exchange, in order to avoid a credit crisis within the country's private sector.

Foreign exchange—currency that is internationally accepted—is critical to Argentina's economy, because its own currency, like that of many other countries, is not accepted in

cross-border transactions. Because of the central importance of foreign exchange to Argentina's economy, as well as the need to ensure the availability of adequate foreign exchange to fulfill sovereign obligations, foreign exchange policy is a central component of the Government's economic program. Under the policies in effect during the relevant period, inflows and outflows of foreign exchange were carefully controlled by the various economic authorities, including the Petitioners. Respondents' claims in this lawsuit directly challenge actions of the Argentine Government integral to those policies.

1. The Parties

The Republic of Argentina is a foreign state as defined by Section 1603(a) of the FSIA (J.A. 6, ¶ 4), and Banco Central de la Republica Argentina ("Banco Central") is an agency or instrumentality of the Republic under the Act (J.A. 6-7, ¶ 5). Pursuant to Argentine law, Banco Central acts as "the State's financial agent," and its "economic, financial, monetary and currency-exchange counsel" (J.A. 57). Its responsibilities include, *inter alia*:

> Regulation of credit within Argentina, for the purpose of fostering economic development and to protect the purchasing power of Argentine currency;
>
> Administration of the nation's reserves of gold, currency and other assets;
>
> Development of Argentina's capital market; and
>
> Supervision of the liquidity and operation of the financial market.

(J.A. 56-57). Banco Central is empowered to "buy and sell in the public securities market for the purpose of regulation" (J.A. 64); issue public securities on behalf of the government (*id.*); and to coin money (J.A. 62). Pursuant to its Charter, Banco Central acts "on behalf of the national government in the placement of public loans . . . and in handling foreign and domestic public-debt service" (J.A. 67). Banco Central's

Charter expressly provides that it is prohibited from participating "directly or indirectly in any commercial . . . enterprise" (J.A. 64).

The three Respondents who seek to compel payment[2] through the United States courts—Weltover, Inc. ("Weltover"), Springdale Enterprises, Inc. ("Springdale"), and Bank Cantrade, A.G. ("Cantrade")—are foreign corporations. Specifically, Weltover and Springdale are Panamanian corporations (J.A. 6, ¶¶ 1, 2), and Cantrade is a bank corporation organized and existing under the laws of Switzerland (J.A. 6, ¶ 3). Respondents have no presence or activity in the United States, and no connection with this country or the State of New York, other than their requests to have Banco Central deposit payments under the Bonods into bank accounts in New York (J.A. 8-11, ¶¶ 13, 19, 26, 33).

2. The Sovereign Actions of the Argentine Government

The origins of Argentina's persistent and critical shortage of foreign exchange date back to the 1970's and early 1980's, when Argentina, like many other nations, borrowed funds from external sources in order to deal with domestic economic problems. This borrowing was undertaken by the Argentine private sector as well as by the Government and its various agencies (J.A. 15-16, ¶ 6; 135). In 1980 and the first quarter of 1981, for example, the country's foreign debt increased by 88% (J.A. 15-16, ¶ 6; 138). This large inflow of foreign funds contributed to significant inflationary pressures and was accompanied by an overvaluation of Argentina's currency.

To appreciate the nature of the Argentine Government's actions in this case, it is necessary to understand the importance of foreign exchange to countries such as Argentina, whose currency is not accepted in the international marketplace. When individuals or businesses in the United States

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2 Respondents claim to hold a total of nineteen Bonods with an aggregate face value of $1.33 million (J.A. 8-11, ¶¶ 14, 22, 29). A total of approximately $1.2 billion in Bonods were issued in connection with the foreign exchange insurance contracts that matured in 1982-83 (J.A. 17, ¶ 9).

seek to make purchases overseas for import to this country, they can make payment in their own currency because the U.S. dollar is accepted in the international marketplace as a medium of exchange. That is not true in Argentina, however, because Argentine currency is not accepted in cross-border transactions (J.A. 14, ¶ 4). Accordingly, in order for Argentine entities or individuals to acquire goods and services from other countries or fulfill lending obligations, they must obtain dollars or other internationally acceptable currencies. For this reason, foreign exchange policy is critical to maintaining a viable Argentine economy.

In order to deal with the financial crisis Argentina faced in the early 1980's, it was necessary for Banco Central and the Ministry of Economy to impose a series of stringent economic measures. These measures led to a rapid devaluation of the Argentine currency. In February 1981, for example, a 10% adjustment in the exchange rate was ordered (J.A. 16, ¶ 7; 76). At the same time, Banco Central also announced the exchange rates that would be in effect until August 1981, which imposed further adjustments at the rate of 3% monthly (J.A. 76). By March of 1981, it was necessary to impose yet another new system of controls, in which Banco Central set the official exchange rate on a daily basis (J.A. 16, ¶ 7; 76). In the month of June 1981 alone, Banco Central adjusted the official exchange rate by 30% (J.A. 16, ¶ 7). One profound effect of this instability in exchange rates was seriously to inhibit the granting and renewal of critical foreign loans to Argentine borrowers.

(c) The FEIC Program

In order to compensate for this tightening of necessary credit, in 1981 Banco Central began a foreign exchange insurance contract program (the "FEIC"). The program was designed to adjust for the problem confronting Argentine borrowers who, because of the rapid devaluation of the Argentine peso, would have to provide unknown and increasing amounts of additional pesos in order to buy the foreign

exchange necessary to meet their obligations when their loans matured (J.A. 16, ¶ 8).

Under the FEIC, the Argentine borrowers would pay to Banco Central a contractually defined amount of local currency, and would receive the necessary dollars to repay their foreign debt when it matured, regardless of intervening devaluations (J.A. 16, ¶ 8). While the normal credit risk thus remained between the domestic borrower and the foreign lender, the Argentine Government undertook to absorb the effects of devaluation. The Government's concern was that absent such a program, the risk of massive devaluation would severely restrict the influx of necessary foreign funds, because neither borrowers nor lenders would have adequate security as to how much local currency would be needed to purchase the foreign exchange required to repay loans.

By 1982 Argentina's economy had deteriorated further, and Argentine currency had suffered additional massive devaluations beyond even what had been anticipated just one year before (J.A. 17, ¶ 9; 116, 140). The pressures on the economy were intensified by the Republic's involvement in the war related to the Malvinas. By the Fall of 1982, the Argentine Government's foreign exchange reserves were wholly insufficient to meet its various foreign exchange obligations, including its obligation to provide the dollars due under the FEIC (J.A. 17, ¶ 9).

(b) The Rescheduling of FEIC Maturities

The Argentine Government determined in the Fall of 1982 that it would be necessary to adopt emergency measures in order to conserve the country's limited supply of foreign exchange. As one component of that program, it created financial instruments which it offered to satisfy its obligations to provide foreign exchange under the FEIC contracts. The Ministry of Economy directed Banco Central to issue Bonods, as well as other alternative financial instruments

(J.A. 29, 32).[3] Banco Central's Charter provides that the National Government bear the costs of such an undertaking (J.A. 67-68, Arts. 31, 33).[4] These Bonods were issued in Argentina and their terms were not negotiated (J.A. 17, ¶ 10).

To underscore the pervasive nature of Argentina's fiscal crisis at that time, in the Fall of 1982 the Government negotiated an emergency new financing and rescheduling program with the international financial community, which included loans from the IMF and the international lenders as well as the refinancing of loans from private banks and various governments (J.A. 18 n.3).

(c) The Bonods

The Bonods confirm on their face that they were issued as a component of the Argentine Government's program to regulate and stabilize its limited supply of foreign exchange. They provide that they are to be applied only to external debt that is subject to foreign exchange insurance agreements with Banco Central, and refer any holder, or potential holder, to

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3 Banco Central also was authorized to issue Bonods in guaranty of the private debt rather than in substitution (J.A. 37). In addition to introducing the Bonods as one form of instrumentation for Banco Central's servicing of the FEIC payments, Banco Central also created promissory notes. The Bonods should not be confused with these promissory notes that have been issued from time to time by Banco Central. The promissory notes, whose terms *were* extensively negotiated, were offered as an alternative to the Bonods (J.A. 17, ¶ 9; 81). Foreign creditors who chose to participate in these programs had the option of taking either the promissory notes or the Bonods (J.A. 111). Extremely detailed in their terms and purporting to address a number of legal and jurisdictional issues, the notes stand in stark contrast to the Bonods (J.A. 106).

4 Accordingly, in order to defray the cost to Banco Central of issuing and servicing the Bonods, the Ministry determined that its own accounts would be "debited to handle financial services and costs engendered by issuance of the securities," and provided that Banco Central could collect from those Treasury funds a so-called "commission" of 0.1% of the amount of the securities it issued (J.A. 35).

the relevant Banco Central regulations—*i.e.*, "Communications" A-31, 54, 61, and 76 (J.A. 14, ¶ 3).

The Bonods also make clear that they are issued by Banco Central "in its capacity as Financial Agent for the State" (J.A. 20). They provide for payment of principal and interest in United States Dollars, subject to and according to the provisions of Argentine Government Decrees 1334 and 1603, excerpts of which are reproduced on each Bonod.[5] Interest rates on the Bonods are linked to the London Interbank rate for Eurodollar deposits, and payment may be made in Frankfurt, London, Zurich or New York (J.A. 24).

The Bonods contain no language that submits to the jurisdiction of the United States courts (J.A. 20). Nor do they state, or imply in any way, that any law other than Argentine law will govern them.[6] Consequently, the Bonods do not contain *any* terms which waive, either explicitly or implicitly, Argentina's sovereign immunity to suit.

(d) The Rescheduling of Bonod Maturities

The foreign debt crisis, accompanied by the serious domestic economic problems which confronted Argentina and other countries, continued throughout the 1980's. In 1984-85, for example, the Argentine Government negotiated a program of massive new financial support and reschedulings with the international financial community, including the IMF, the United States, and other governments and private lending institutions (J.A. 18 n.3).

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5 These conditions for payment include, *inter alia*, restrictions on transfer and proper notice of transfer to Banco Central (J.A. 24).

6 While Banco Central was empowered to grant an extension of jurisdiction in the instruments it created (J.A 34, Art. 3(g) of Decree 1336), it did *not* do so with respect to the Bonods (*Compare* J.A. 20 *with* J.A. 108-09). This is no different than the power of the United States Government to waive its sovereign immunity, a power it, like the Argentine Government, exercises only in very limited and clearly-defined instances. *See, e.g.*, 28 U.S.C. § 1346 (1988).

Thus, when the Bonods began to mature on May 26, 1986, the Argentine Government still lacked sufficient foreign exchange to meet its obligations, including the retirement of the Bonods. As a result it was forced to implement an ordered system of allocating scarce foreign exchange (J.A. 18, ¶ 12; 116; 120). As it continued discussion with other sovereigns and with international organizations such as the IMF, the Republic determined that adjustment of capital maturity dates for the Bonods was necessary. A diplomatic note describing that decision was sent to the Secretary of the United States Treasury, James A. Baker, III, as part of the ongoing consultations between the two nations over this issue of mutual concern (J.A. 18, ¶ 12).

As one component of this program, the Ministry of Economy was empowered by the President of the Republic temporarily to extend amortizations of principal corresponding to Bonods, and to instruct Banco Central to promulgate the standards and the procedures necessary to do so (J.A. 118). The Ministry of Economy instructed Banco Central to implement the temporary extension of maturity dates; to include these instruments in the new program of general refinancing being undertaken by Banco Central; and to communicate the extension to the holders of the instruments (J.A. 17, ¶ 9; 120). This decision was jointly announced to holders of these instruments by the President of Banco Central and the Secretary of the Argentine Treasury (J.A. 123). A subsequent rescheduling, which was negotiated jointly by the Ministry of Economy and Banco Central with the international financial community, was implemented as part of the Republic's 1987 Financing Plan (J.A. 147).[7] Pursuant to this plan and the

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7 Included in this restructuring were $1.95 billion in new commercial bank loans to the Republic; restructuring of approximately $30 billion in existing public and private sector debt by commercial banks; agreements concerning trade and money market lines to Argentine entities; a debt-to-equity conversion program which allows for conversion of Argentine public debt into equity investments in Argentina; new loans from the IMF and World Bank; and the rescheduling of debts owed to other governments, including the United States (J.A. 18-19, ¶ 14). Plaintiffs are among the few holders of Bonods who declined to participate in this comprehensive refinancing program.

persistent economic exigencies that necessitated the rescheduling, the payments Respondents seek to compel continue to be prohibited by government policy (J.A. 18-19, ¶ 14).

SUMMARY OF THE ARGUMENT

The Foreign Sovereign Immunities Act of 1976 provides that foreign sovereigns are immune from the jurisdiction of United States courts unless a statutorily-defined exception to immunity applies. 28 U.S.C. § 1604. The "commercial activity" exception to immunity directs that a foreign state shall not enjoy immunity in a case which is based upon "commercial activity . . . or upon an act . . . in connection with a commercial activity," if the complained-of conduct has a specified nexus with this country. 28 U.S.C. § 1605(a)(2). The conduct of the Argentine Government—the issuance and rescheduling of debt instruments as a component of its regulation of Argentina's critical supply of foreign exchange—is sovereign, and not commercial, because it goes to the very heart of the Government's unique role in administering Argentina's economy. Nor does this lawsuit have a jurisdictionally-sufficient connection with this country, because the failure to pay Respondents, foreign corporations that have no connection with this country other than their requests to receive payment here, is insufficient to meet the nexus requirement of the Act.

The Act defines "commercial activity" in terms of the process by which it should be evaluated, and directs that the character of foreign state conduct be determined "by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d). Because the facts and circumstances attendant to the sovereign's actions give meaning to its conduct, the Act clearly contemplates that the conduct to be reviewed will be examined in context rather than in isolation. Sovereign issuance of debt is to be evaluated under the Act like any other sovereign conduct: based on the nature of the acts underlying its creation. Properly viewed in context, Peti-

tioners' conduct in issuing and rescheduling the instruments at issue is conduct unique to sovereigns, and thus is not commercial activity under the Act.

Petitioners' failure to pay the Respondent alien corporations in New York does not constitute the "direct effect" in this country required to support jurisdiction under the FSIA. Under the provision of the Act applicable to this case, jurisdiction is present only where foreign state conduct outside the United States causes a "direct effect" in this country. In this regard the FSIA is a long-arm statute crafted to place foreign sovereigns on an equal footing with private parties in terms of jurisdiction. It requires *substantial* contacts with the forum that are related to the cause of action before jurisdiction can be exercised. Petitioners' failure to pay money here to Respondents, who have no discernible presence in this country save their designation of New York as the place of payment, does not meet that requirement and is an insufficient basis for jurisdiction under the Act.

ARGUMENT

I. THE PROMULGATION AND RESCHEDULING OF THE BONODS BY THE ARGENTINE GOVERNMENT PETITIONERS WAS NOT COMMERCIAL ACTIVITY

The Foreign Sovereign Immunities Act of 1976,[8] provides the only basis for obtaining jurisdiction in this country over a foreign nation.[9] The Act directs that foreign states "shall be immune from the jurisdiction of the courts of the United States and of the States" unless certain defined exceptions are met. 28 U.S.C. § 1604. The jurisdiction-conferring provision of the FSIA provides that the district courts have jurisdiction only over those claims for which a foreign state defendant is not entitled to immunity under the substantive provisions of the Act. 28 U.S.C. § 1330(a). Accordingly, a

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8 Pub. L. No. 94-583, 90 Stat. 2891, *codified as* 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611 (1976).

9 *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989).

foreign nation's immunity from suit in the United States is the rule; jurisdiction exists only where the nation's conduct falls within one of the defined exceptions contained in the FSIA.

The most frequently invoked FSIA jurisdictional predicate is the "commercial activity" exception to sovereign immunity. *Texas Trading & Milling Corp.* v. *Federal Republic of Nigeria*, 647 F.2d 300, 307 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982). This provision provides that a foreign state shall not enjoy sovereign immunity in a case which is based upon "commercial activity . . . or upon an act . . . in connection with a commercial activity," if the complained-of conduct has a specified nexus with this country. 28 U.S.C. § 1605(a)(2). The nexus requirement is discussed in Part II of this brief. In each instance, jurisdiction can be present, and the nexus requirement comes into play, *only if* the lawsuit is based upon conduct of the foreign sovereign that is deemed "commercial."

The Second Circuit concluded that the Petitioners' relevant actions were commercial, and not sovereign. It did so despite the fact that this action is based upon the issuance of financial instruments in Buenos Aires, by Banco Central as financial agent for the Republic, in fulfillment of the Government's own obligation under a plainly sovereign program involving the regulation of the nation's limited supply of foreign exchange. The circuit court reached its decision by beginning and ending its analysis with the fact that what was at issue was the issuance of a debt instrument. In so doing, the court erred in two related respects.

First, the circuit court erred in applying what amounts to a *per se* rule that the issuance of debt is commercial activity (Pet. App. A at 9a-10a). No such rule is contained in, or contemplated by, the FSIA. Second, the court erred in artificially separating Petitioners' acts from their context, and examining them in clinical isolation devoid of any meaningful background. As set forth below, in directing that the character of the foreign state's conduct be determined by reference

to its nature,[10] the FSIA requires that the acts in issue be evaluated in their factual context. That analysis, properly applied, compels the conclusion that Petitioners' conduct is not commercial, but sovereign activity.

A. There Is No *Per Se* Rule That Issuance Of Debt Is Commercial Activity

The plain language of the FSIA contains no provision which addresses foreign state issuance of debt, and the Act's legislative history confirms that there is no *per se* rule that all debt instruments are commercial. Instead, there was uncertainty in Congress as to whether there should be a *per se* rule *in favor* of immunity with respect to claims based on a foreign sovereign's debt. The bill that became the FSIA, as introduced on recommendation of the Departments of State and Justice, contained a provision, Section 1606, titled "Claims involving the public debt," which would have conferred immunity on all debt "incurred for general governmental purposes." H.R. 11315, 94th Cong., 2d Sess. (1976).[11] The provision was dropped before the bill became law in 1976.

In explaining the decision not to enact a *per se* rule in favor of sovereign immunity with respect to suits based on a foreign sovereign's debt, the House Judiciary Committee identified those situations in which jurisdiction over a foreign sovereign sued over public debt would be appropriate. First, the committee observed that "an indebtedness incurred by a foreign state which negotiates or executes a loan agreement in the United States, or which receives financing from a private

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10 *See* 28 U.S.C. § 1603(d).

11 This proposed provision read, in pertinent part, as follows:

> (b) Notwithstanding the provisions of section 1605 of this chapter, a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States in any case relating to debt obligations incurred for general governmental purposes . . . .

H. R. 11315 (proposed § 1606).

The provision indicated that it would not apply where the foreign state has waived its immunity explicitly or the case arises under provisions of United States securities laws. *Id.*

or public lending institution located in the United States" would be included within the scope of Section 1605(a)(2), the commercial activity section of the Act. House Judiciary Comm., *Jurisdiction of U.S. Courts in Suits Against Foreign States*, H.R. Rep. No. 1487, 94th Cong., 2d Sess. 17 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6615-16 [hereinafter *House Report*]. Clearly neither of those scenarios is present here. In addition, the Committee thought that:

> In practice, the provision would have had virtually no effect because U.S. underwriters of foreign government bonds and U.S. banks lending to foreign governments would invariably include an express waiver of immunity in the debt instrument.

House Report, *supra*, at 10. The Bonods, of course, contain no such waiver. Thus, this case includes none of the elements identified by Congress as warranting an exception to immunity where a foreign state is sued based on the issuance of debt. The legislative history demonstrates that Congress believed that under the Act, foreign sovereign debt would be treated as any other sovereign conduct: evaluated on the nature of the acts underlying its issuance.

The pre-FSIA law confirms that in adopting the FSIA, Congress was not enacting a *per se* rule with respect to debt. The FSIA standard for classifying foreign state conduct as sovereign, and therefore immune from jurisdiction, is derived from the pre-statute practice of applying the so-called "restrictive" theory of sovereign immunity. Under this doctrine, foreign states are deemed immune from the jurisdiction of the courts of this country with respect to their "public" acts, and are denied immunity only with respect to their "private" or commercial acts. Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in* 26 Dep't. of State Bull. 984 (1952).

The leading pre-FSIA case makes clear that public debt never was treated as *per se* commercial conduct. *Victory Transport, Inc.* v. *Comisaria Gen. de Abastecimientos y*

Transportes, 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965). In fact just the opposite was true. As the court in *Victory Transport* noted:

> [W]e are disposed to deny a claim of sovereign immunity that has not been "recognized and allowed" by the State Department unless it is plain that the activity in question falls within one of the categories of strictly political or public acts about which sovereigns have traditionally been quite sensitive. Such acts are generally limited to the following categories:
>
> (1) internal administrative acts, such as expulsion of an alien.
>
> (2) legislative acts, such as nationalization.
>
> (3) acts concerning the armed forces.
>
> (4) acts concerning diplomatic activity.
>
> (5) *public loans.*

336 F.2d at 360 (emphasis added). While not every principle articulated in the *Victory Transport* decision remains the law today,[12] it is significant that under pre-FSIA practice, "public loans" were deemed to be sovereign.

The statute and its history are thus devoid of support for the Second Circuit's view that the Act embraces a *per se* rule denying immunity in suits based upon public debt. Rather, Congress expressly rejected the notion that there could be a precise definition of "commercial activity," and put " '[i]ts faith in the U.S. courts to work out progressively on a case-by-case basis . . . the distinction between commercial and governmental.' " *Texas Trading*, 647 F.2d at 309 (quoting *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Adminis-*

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12 For example, the court in *Victory Transport* wrestled with and ultimately rejected the distinction between "nature" and "purpose" of the transaction giving rise to the claim, 336 F.2d at 359-60, while the FSIA makes that distinction explicitly in § 1603(d).

trative Law and Governmental Relations of the House Comm. on the Judiciary, 94th Cong., 2d Sess. 53 (1976) [hereinafter *House Hearings*] (testimony of Monroe Leigh, Legal Adviser, Department of State)). Indeed, the difficulty in defining sovereign conduct has led this Court to recognize that it is rarely possible to adopt immutable principles in this area. *See, e.g., Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-47 (1985) (rejecting as unworkable "a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional' "); *Indian Towing Co.* v. *United States*, 350 U.S. 61, 68 (1955) (rejecting the "uniquely governmental function" test in the area of government tort liability); *New York* v. *United States*, 326 U.S. 572, 583 (1946) (concluding that a rule of state immunity from federal taxation cannot be based upon "such untenable criteria" as "historically sanctioned activities of government").

Proper analysis of foreign government conduct under the Act requires at minimum that the foreign state's actions be viewed in context, in the light of the attendant facts and circumstances. In this case, the resulting picture is one of wholly sovereign conduct.

B. The FSIA Requires That The Sovereign's Conduct Be Analyzed In Context In Order Properly To Determine Its Nature

The first step in the FSIA commercial activity analysis is to properly identify the conduct that is relevant to the court's inquiry. *See, e.g., Texas Trading*, 647 F.2d at 308. This has proven to be no easy task,[13] yet more often than not it is dispositive of the commercial activity question. *See International Ass'n of Machinists* v. *OPEC*, 649 F.2d 1354, 1357 (9th Cir. 1981) ("immunity question may be determined by how broadly or narrowly [t]he activity is defined"), *cert. denied*, 454 U.S. 1163 (1982). That is because—as in this case—the

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13 *See, e.g., Segni* v. *Commercial Office of Spain*, 835 F.2d 160, 163 (7th Cir. 1987) (noting that difficulty in applying commercial activity exception "has resulted in differing approaches on the parts of different courts").

lens through which the court views the foreign state conduct before it inevitably affects its legal characterization of the activity under review.

1. The context in which the foreign state's conduct occurs gives meaning to its nature

The FSIA defines "commercial activity" in terms of the process by which foreign state conduct should be evaluated. Specifically, the statute provides that

> [t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

28 U.S.C. § 1603(d). The Act thus explicitly contemplates that the conduct under review will *not* be examined in isolation. Rather, the Act directs that courts analyze not only a "transaction" or an "act" by the foreign sovereign, but the "nature of the course of conduct." *See* 28 U.S.C. § 1603(d). The legislative history of the Act, too, makes it clear that the drafters intended and expected that the courts would consider "the course of conduct during the transaction—what does occur rather than the end result." *House Hearings*, *supra*, at 53. The circuit court ignored this clear language.

While some courts, including the court of appeals here, have voiced concern that if the lens is too broad it will inevitably involve some consideration of the sovereign's "purpose," it is equally true that a lens that is too narrow will obscure facts necessary to accurately analyze the nature of the activity at issue. Moreover, this case well illustrates that viewing the sovereign's relevant course of conduct—here including the nature of the origin of the debt in issue—need not and does not implicate any consideration of the sovereign's motives or intent, but focuses strictly on the relevant facts and events which give meaning to its actions.

The need to consider the facts and circumstances attendant to the foreign state's conduct is well illustrated by comparing

this case with the analysis applied by the Fifth Circuit in *De Sanchez* v. *Banco Central de Nicaragua*, 770 F.2d 1385 (5th Cir. 1985). There, as here, the discrete acts at issue were a foreign state's issuance of, and failure to honor, a promise to pay money. The Fifth Circuit, however, concluded that this conduct was sovereign, and not commercial, after evaluating it in conjunction with the attendant circumstances.[14] As the *De Sanchez* court explained, identical actions often may be properly characterized in different ways depending upon the context.[15] The act of issuing a check, for example, may be a simple and routine commercial sale of foreign currency, or "regulation and supervision of a nation's foreign exchange reserves," a quintessential sovereign act. 770 F.2d at 1392-93. Whether or not the Fifth Circuit was correct on the facts, its analysis is instructive. The Seventh Circuit also has recognized that the *De Sanchez* court's consideration of the context for the government's actions, including the government's role in conserving scarce foreign exchange at a time of national crisis, was necessary to comprehend the nature of the relevant foreign state conduct. *See Rush-Presbyterian-St.*

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14 The Fifth Circuit noted, *inter alia*, that the Nicaraguan Central Bank "became involved with [the plaintiff] only in its official role of regulating the sale of foreign exchange," and the government's "only authorized purpose in issuing [the obligation] was to maintain stable exchange rates and to allocate scarce foreign exchange reserves." *De Sanchez*, 770 F.2d at 1393. This case presents significantly more compelling facts than those in *De Sanchez*, but the Circuit Court believed, incorrectly, that it was precluded from considering those facts.

15 The *De Sanchez* court aptly noted:

> [W]e do not believe that an absolute separation is always possible between the ontology and the technology of an act. Often, the essence of an act is defined by its purpose . . . Unless we can inquire into the purposes of such acts, we cannot determine their nature.
>
> . . . .
>
> Banco Central was not merely engaging in the same activity as private banks with a different purpose; in a basic sense, it was engaging in a different activity. It was performing one of its intrinsically governmental functions as the Nicaraguan Central Bank.

770 F.2d at 1393.

Luke's Medical Ctr. v. *Hellenic Republic*, 877 F.2d 574, 578-79 n.5 (7th Cir.), *cert. denied*, 493 U.S. 937 (1989).

The approach of these opinions is equally applicable to this case. The circuit court viewed Petitioners' acts through an artificially narrow lens, and barred relevant facts from its inquiry, because it erroneously believed it was required to "isolate" the specific acts complained of by Respondents, rather than evaluate them in the context in which they took place (Pet. App. A at 8a). To do otherwise, the court concluded, would be to define the conduct "overbroadly," with the result that the government conduct at issue "would almost inevitably be characterized as sovereign in nature." *Id.* What the Second Circuit failed to recognize, however, is that the converse also is true: if a court insists on surgically removing foreign government acts from their context, and examining them microscopically in the absence of any meaningful background, they will almost inevitably appear to be identical to conduct engaged in by private actors.

This does not mean that every act of a foreign government must be viewed as part of a long flow of events and actions originating with some perceived public need. To require this would inevitably lead to consideration of the purposes of the Governmental action. Rather, it means that what must be analyzed is the nature of the course of conduct immediately relevant to the particular act at issue. In the context of debt, this requires, at a minimum, examination of the nature of the conduct underlying the creation of the debt. Any other result would not only be inconsistent with the express language of the statute, but would engraft onto the statute a *per se* rule that all debt is commercial.

2. Petitioners' relevant actions constitute sovereign conduct

Properly viewed in context, Petitioners' acts are clearly sovereign. The legislative history of the Act suggests that courts should "inquire whether the activity in question is one which private persons ordinarily perform or whether it is

peculiarly within the realm of governments." *House Hearings*, *supra*, at 53. Congress articulated its concern that there be a mechanism for legal recourse against foreign nations as their governments increasingly entered the marketplace to do business with United States citizens. *House Report*, *supra*, at 16. The FSIA's drafters correctly anticipated that some number of "ordinary legal disputes" inevitably would result from such instances, which they envisioned would include situations where

> U.S. businessmen sell goods to a foreign state trading company, and disputes may arise concerning the price. Another is when an American property owner agrees to sell land to a real estate investor that turns out to be a foreign government entity and conditions in the contract of sale may become a subject of contention.

House Report, *supra*, at 6-7. Congress thus intended that foreign states be subject to jurisdiction in United States courts for their contract dealings, but only where those contracts were "of the same character as a contract which might be made by a private person." *House Report*, *supra*, at 16.

While some cases present close questions, others are easy to resolve. Contracts to sell goods, *see*, *e.g.*, *Crimson Semiconductor, Inc.* v. *Electronum*, 629 F. Supp. 903 (S.D.N.Y. 1986), and contracts to buy them, *see*, *e.g.*, *Texas Trading*, 647 F.2d 300, fall into the latter category. Other types of government conduct, which have unique sovereign attributes but are in some way similar to private conduct, may be more problematic. *See*, *e.g.*, *Arango* v. *Guzman Travel Advisors Corp.*, 621 F.2d 1371 (5th Cir. 1980), *cert. denied*, 474 U.S. 995 (1985).[16] The government conduct at issue in this case, in

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16 In *Arango*, the plaintiffs brought breach of contract, negligence, battery, and false imprisonment claims against the Dominican national airline after they were denied entry as vacationers into the Dominican Republic. The court held that the airline was not entitled to sovereign immunity on the breach of contract and tort claims, even though, in breaching the tour contract, it was complying with the government's sovereign decision to exclude the plaintiffs. 621 F.2d at 1379-80. The airline *was* found entitled to sovereign immunity on the battery and false imprisonment claims, where it had acted "as an arm or agent of the Dominican government." *Id.* at 1379.

contrast, cannot be construed as activity which might be undertaken by a private person in any respect: it is quintessentially sovereign.[17]

Even under the circuit court's analysis, Petitioners' conduct in issuing the Bonods was sovereign, and not commercial, because, unlike transactions in which private parties engage, Petitioners agreed to become obligated for debt, but received consideration in no way commensurate with its value.[18] Even in that sense, Petitioners engaged in conduct that no private individual ever would contemplate, let alone "ordinarily perform." When viewed in context, the conclusion that Petitioners' conduct was sovereign is even clearer.

The Court recognized more than 150 years ago that there is a clear and central role for the sovereign in the regulation of currency and other functions relating to the finances of the State. *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 324

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17 The Court, like Congress, has recognized that there is a "line between the State as government and the State as trader," and that the line is crossed where a government entity "enters the market place seeking customers," *New York* v. *United States*, 326 U.S. 572, 579 (1946). At the other end of the spectrum, it also has recognized that when the State acts in certain contexts and in certain limited roles, it will be engaged by definition in a uniquely governmental function. *See United States* v. *Johnson*, 481 U.S. 681 (1987) (finding the relationship of the government to its armed forces to be distinctly federal). Thus, while buying boots for the army places the State in the marketplace as a trader, *Texas Trading*, 647 F.2d at 309, promulgating regulations as to when and where to wear them presumably does not. These are the easy cases. The same should be true for this case, where the Argentine Government Petitioners did not enter the marketplace in any sense, but rather acted in their sovereign role to regulate Argentina's limited supply of foreign exchange.

18 The district court, straining to find a commercial connection, seized upon the 0.1% reimbursement—the so-called "commission"—which Banco Central received from the national treasury (J.A. 35). As is clear in the record, however, that "fee" was paid to Banco Central by the Republic, and thus by definition there could be no net gain to Petitioners. What was involved was simply an accounting within the Government, for costs being incurred by one Government agency for acts it was taking on behalf of the other (J.A. 32). The Second Circuit "express[ed] no view" on the district court's conclusion (Pet. App. A at 8a n.1).

(1819). There are few activities more peculiarly within the province of government than the administration of a nation's money supply and the promulgation of attendant regulations and laws. Moreover, in this case the government acted in the midst of an acute monetary crisis which threatened the viability of the Argentine nation's economy. Surely conduct for "the purpose of saving its national economy from the brink of monetary disaster . . . represents the 'exercise [of] powers peculiar to sovereigns.' " *Braka* v. *Bancomer, S.N.C.*, 762 F.2d 222, 225 (2d Cir. 1985) (quoting *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 704 (1976)). Accordingly, a nation's promulgation of foreign exchange regulations, especially in response to economic crisis, has properly been held to be " 'precisely the type of governmental activity that cannot be subjected to judicial scrutiny.' " *Callejo* v. *Bancomer, S.A.*, 764 F.2d 1101, 1108 (5th Cir. 1985) (quoting *Braka*); *see also De Sanchez*, 770 F.2d at 1392-93.[19]

The circuit court, however, declined to examine Petitioners' issuance of the Bonods, or the rescheduling, as other than isolated acts. Indeed, after discussing it (Pet. App. A at 2a-4a), the court expressly declined to consider Petitioners' course of conduct in its evaluation of their discrete acts (Pet. App. A at 10a). Accordingly, the Second Circuit's analysis ignored a number of facts important to an understanding of the true nature of Petitioners' conduct.

First, the court below dismissed the fact that the Bonods were created by the Argentine Government to fulfill its obligations under a foreign exchange program designed to address a domestic credit crisis, and as a component of a program designed to control that nation's critical shortage of

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19 Those decisions were clearly correct in light of the economic and political realities of the modern world, which dictate a like result in this case. *See, e.g.*, Marcelo Selowsky, *Stages in the Recovery of Latin America's Growth*, Finance & Development, June 1990, at 28 (discussing complementary relationship between domestic economic policies and external financing); *Debt Crisis Dominates Economic and Social Council Debate*, U.N. Chronicle, December 1989, at 64 (discussing "impact of 1980's debt crisis on the world economy").

foreign exchange. It thus ignored that the Bonods (a) raised no capital; and (b) were not the mechanism for financing trade or acquisitions by a government entity. It likewise ignored that the Petitioners issued the Bonods without receiving consideration commensurate with their value in any customary sense.

These facts, however, give meaning to the nature of the conduct at issue. Without them, the court below had before it only the end result of Petitioners' actions, which Congress has told us and logic confirms is too narrow a snapshot to permit the true picture of Petitioners' conduct to emerge. Viewed in context as the Act directs, Petitioners' conduct clearly was sovereign. For that reason, the decision of the court of appeals should be reversed.

II. THE FAILURE TO PAY FOREIGN CORPORATIONS IN NEW YORK IS NOT A "DIRECT EFFECT" IN THE UNITED STATES SUFFICIENT TO SUPPORT JURISDICTION UNDER THE ACT

The FSIA provides that even where a foreign state has engaged in commercial activity, the sovereign's relevant acts must have a sufficient nexus with the United States in order to support jurisdiction. *See Stena Rederi AB* v. *Comision de Contratos del Comite Ejecutivo Gen. del Sindicato Revolucionario de Trabajadores Petroleros de la Republica Mexicana, S.C.*, 923 F.2d 380, 386 (5th Cir. 1991); *America West Airlines, Inc.* v. *GPA Group, Ltd.*, 877 F.2d 793, 796 (9th Cir. 1989). Specifically, the Act provides for jurisdiction where:

> the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or *upon an act outside the territory of the United States* in connection with a commercial activity of the foreign state elsewhere *and that act causes a direct effect in the United States.*

28 U.S.C. § 1605(a)(2) (emphasis added).

The Act thereby provides a template for measuring when foreign state conduct is within the jurisdiction of the court, based in part on the strength of the relationship between the lawsuit and this country. The nexus categories begin with the situation in which the action is based upon the sovereign defendant's broad presence here (the first clause); include the situation where the foreign state has actually come into this country and committed the complained-of act here (the second clause); and end with the direct effect provision at issue in this case (the third clause), which reaches actions based upon foreign state conduct outside this country, but only if it causes a direct effect here.

The courts below found, and the Respondents concede, that this lawsuit has but a single connection with this country: the alleged nonreceipt of payment by wholly foreign corporations in bank accounts located in New York City, after earlier payments had been made to those accounts, under an instrument whose only reference to the United States was to list New York as one of four possible places of payment. Relying on this lone contact, the court of appeals divined a "direct" effect from the perceived need to protect New York's role as an international payments center.

This contact, without more, is insufficient to meet the nexus requirement imposed by the Act. As discussed below, this is the clear result if one looks to the plain meaning of the statute (Section A), to the expressed intent of Congress that jurisdiction be based only upon the foreign state's contacts with the forum that are related to the cause of action (Section B), to the drafter's direction that any jurisdictional effect in this country must be substantial (Section C), and to Congress's intent that foreign sovereigns be placed on an equal footing with private parties under traditional principles of "long arm" jurisdiction (Section D). Finally, as also is discussed below, it is clear that any broader reading of the nexus requirements of the Act would exceed the Constitution's due process limits (Section E).

A. The Language Of The Act Requires Something More Than A General Effect In This Country Before Jurisdiction Can Be Exercised

The provision of the Act applicable to this case provides that subject matter jurisdiction is present only where the action is based upon:

> an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and *that* act causes a *direct effect* in the United States.

28 U.S.C. § 1605(a)(2) (emphasis added). The starting point for discussion is that this language means what it says—the effect must be *direct*, and it must flow from the specific act at issue. Any other type of effect simply will not do. Were *any* effect here to suffice, we can presume that Congress would have drafted the statute to say so.[20]

While courts have found a direct effect in the United States when a United States corporation suffers financial loss here as a result of a sovereign's commercial activity, *see, e.g.*, *Texas Trading & Milling Corp.* v. *Federal Republic of Nigeria*, 647 F.2d 300, 312 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982); *Crimson Semiconductor, Inc.* v. *Electronum*, 629 F. Supp. 903, 907 (S.D.N.Y. 1986); *Exchange Nat'l Bank* v. *Empresa Minera Del Centro Del Peru S.A.*, 595 F. Supp. 502, 505 (S.D.N.Y. 1984). It is difficult to conceive how the economic loss suffered by *non*-United States residents, whose

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20 Congress did just that with respect to a different section of the FSIA, the tortious conduct exception to sovereign immunity, which provides for jurisdiction over cases where money damages are sought for personal injury, death or damage to or loss of property occurring in the United States. Under that provision, which simply speaks in terms of "damage" or "loss" in the United States, it appears that *any* harm in this country does suffice to authorize jurisdiction. 28 U.S.C. § 1605(a)(5). It is not surprising that an effect of any magnitude, however small, apparently will provide an adequate predicate for jurisdiction under this section, because, in contrast to the commercial activity provision, the tortious activity exception applies only where both the effect *and* the complained-of act take place in this country. *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989).

only contact with the United States is their choice to collect here a payment contracted for elsewhere, can ever be considered a jurisdictionally-sufficient direct effect.

The Second Circuit recognized this problem. It chose, however, not to focus on the effect of the Petitioners' actions on the Respondents. Instead, it rested its finding of a sufficient jurisdictional nexus on a public policy concern that the courts "preserve . . . New York's status as a world financial leader" (Pet. App. A at 13a). In so doing, it reiterated the concern it had articulated earlier in its act of state discussion in *Allied Bank Int'l* v. *Banco Credito Agricola de Cartago*, 757 F.2d 516, 521-522 (2d Cir.), *cert. dismissed*, 473 U.S. 934 (1985). The potential impact of refusing to extend jurisdiction to this case, the circuit court reasoned, might affect New York's position as a respected clearinghouse of United States dollars, thus justifying the conclusion that jurisdiction was proper (Pet. App. A at 14a).

A policy concern such as that expressed in *Allied Bank*, however, which might be relevant in the context of an act of state analysis, hardly is relevant to the jurisdictional requirements of the Act.[21] An act of state analysis weighs the respective interests of the United States and the foreign government only *after* the court concludes that it has jurisdiction over the case pursuant to the FSIA. Reliance on such policy considerations may be appropriate in applying this judicially created doctrine. And, there may be—although we doubt it[22]—*an* effect in the United States should sovereigns regularly refuse to make payments payable in New York. This kind of policy-based analysis, however, provides neither the necessary predictability for sovereigns that is contemplated by the Act, nor

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21 In *Allied Bank* there was no necessity for a jurisdictional analysis because, as the court noted, at the foreign defendants "conceded jurisdiction in New York." 757 F.2d at 521.

22 *See Verlinden B. V.* v. *Central Bank of Nigeria*, 488 F. Supp. 1284 (S.D.N.Y. 1980), *aff'd on other grounds*, 647 F.2d 320 (2d Cir. 1981), *rev'd on other grounds*, 461 U.S. 480 (1983).

the *direct* effect of the sovereign's act mandated by the statute.

B. The FSIA Provides For Jurisdiction Based Only Upon A Foreign State's Contacts With The Forum That Are Related To The Cause Of Action

The nature of the effect required to support jurisdiction is defined by the statute, and on this point the legislative history of the FSIA is fully consistent with the express language of Section 1605(a)(2). Both make it clear that the Act extends jurisdiction only to actions which are based upon substantial forum contacts of the foreign state, and considers only those forum contacts that are related to the cause of action. The Report of the House Judiciary Committee expressly states that in this respect the Act was patterned after the long-arm statute enacted by Congress for the District of Columbia. *See House Report*, *supra*, at 13.[23] The District of Columbia model rests jurisdiction only upon foreign defendants' contacts with the District that are related to the cause of action sued upon; like the FSIA, it does not purport to reach a defendant simply as a result of his overall contacts with the forum. *See* 13 D.C. Code § 13-423 (1973); *see also Harris* v. *Vao Intourist, Moscow*, 481 F. Supp. 1056, 1062 (E.D.N.Y. 1979).[24]

Testimony before the subcommittee which drafted the bill indicates that this structure was chosen carefully, and for good reason. As Bruno A. Ristau, then Chief of the Foreign

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23 Specifically, the Report indicates that the Act was patterned after Public Law No. 91-358, sec. 132(a), tit. I, 84 Stat. 549.

24 The District of Columbia long-arm statute, in turn, was modeled after and provides for substantially the same bases of jurisdiction as the comparable laws of Maryland and Virginia and the Uniform Interstate and International Procedure Act. *See* H.R. Rep. No. 907, 91st Cong., 2d Sess. 61 (1970). Each of these statutes also eschews general jurisdiction over a foreign defendant, and limits the jurisdictional analysis to forum contacts related to the lawsuit. MD. CTS. & JUD. PROC. CODE ANN. § 6-103 (1989); VA. CODE ANN. § 8.01 - 328.1 (Michie 1984); UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT § 1.03, 13 U.L.A. 361 (1986).

Litigation Section of the Civil Division, Department of Justice, explained:

> [T]he long-arm feature of the bill will insure that only those disputes which have a relation to the United States are litigated in the courts of the United States, and that our courts are not turned into small "international courts of claims." The bill is not designed to open up our courts to all comers to litigate any dispute which any private party may have with a foreign state anywhere in the world.

House Hearings, *supra*, at 31.

All of the foregoing confirms that only those contacts which relate to the cause of action may form the basis of a United States court's assertion of jurisdiction over a foreign sovereign. Here those contacts are limited to the Petitioners' failure to pay money to the Respondents in the United States—a wholly insufficient basis upon which to rest jurisdiction under the Act.

C. Nonpayment Of A Debt To Foreign Plaintiffs Is Not A Substantial Forum Contact On Which FSIA Jurisdiction Can Rest

Congress clearly intended that the Act incorporate the test set forth in Section 18 of the *Restatement (Second) of the Foreign Relations Law of the United States* (1965) [hereinafter *Restatement (Second) of Foreign Relations Law*], which requires any jurisdictional "effect" in this country to be substantial as well as foreseeable. The House Report which recommended passage of the Act stated that the direct effect requirement was crafted to embrace commercial conduct having effects in the United States which would be subject to jurisdiction consistent with the principles set forth in Section 18. *House Report*, *supra*, at 19. This provision, in turn, limits a state's jurisdiction to extend it's law to conduct which occurs outside the country to instances in which the effect

within the territory is substantial.[25] The court of appeals apparently recognized that the "loss" suffered here by these foreign corporations, whose only connection with the United States was the maintenance of bank accounts, would not constitute a substantial effect in the United States under any reading of the conduct at issue. It simply, therefore, rejected the substantiality requirement as being irrelevant.

In stark contrast to the Second Circuit, the majority of circuit courts that have grappled with the direct effect issue have embraced the requirement that there be a substantial effect in the United States in order to assert jurisdiction under this provision of the FSIA. *See, e.g., America West Airlines*, 877 F.2d at 799; *Zernicek* v. *Brown & Root, Inc.*, 826 F.2d 415, 417-18 (5th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988); *Maritime Int'l Nominees Estab.* v. *Republic of Guinea*, 693 F.2d 1094, 1110-11 (D.C. Cir. 1982), *cert. denied*, 464 U.S. 815 (1983); *Ohntrup* v. *Firearms Ctr., Inc.*, 516 F. Supp. 1281, 1286 (E.D. Pa. 1981), *aff'd mem.*, 760 F.2d 259 (3d Cir. 1985); *see also Rush-Presbyterian-St. Luke's Medical Ctr.* v. *Hellenic Republic*, 877 F.2d 574, 581 (7th Cir.) (stating that the "effects of a foreign state's actions must be 'substantial' and 'direct and foreseeable' "), *cert. denied*, 493 U.S. 937 (1989).

Under this standard, it is clear that jurisdiction is not present in this case, because, as has been aptly noted, each Respondent corporation "[u]nlike a natural person . . . can only suffer financial loss." *Texas Trading*, 647 F.2d at 312. The Second Circuit in this case never explained how an entity incorporated and domiciled elsewhere can suffer a direct *or* substantial financial loss here, where the Respondents are foreign corporate entities with no presence in this country,

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25 The provision reads in relevant part as follows:

> The effect within the territory *is substantial*; . . . it occurs as a *direct and foreseeable* result of the conduct outside the territory; and . . . the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

Restatement (Second) of Foreign Relations Law § 18 (1965) (emphasis added).

and they allege nothing more than nonreceipt of payment in New York maildrop bank accounts.

Finally, analyses utilized to determine whether subject matter jurisdiction exists over foreign violations of federal securities law parallel the Act's nexus test, and they, too, confirm that any United States effect in this case cannot be considered substantial for jurisdictional purposes. In considering whether conduct occurring outside the United States may be subject to the securities statutes, courts have required either related conduct in this country or a *substantial effect* in the United States. *See, e.g., Tamari* v. *Bache & Co. S.A.L.*, 730 F.2d 1103, 1106 (7th Cir.), *cert. denied*, 469 U.S. 871 (1984);[26] *Restatement (Third) of the Foreign Relations Law of the United States* § 416(2) (1987). Courts that have applied this "effects" test have done so based on section 18 of the *Restatement (Second) of Foreign Relations Law*. *See Tamari*, 730 F.2d at 1107 n.6; *Continental Grain Pty., Ltd.* v. *Pacific Oilseeds, Inc.*, 592 F.2d 409, 417 n.12 (8th Cir. 1979). In applying this test courts have also concluded that a general effect on the American economy or American investors will not suffice: the requisite effect must also be on a *particular* United States plaintiff, or *particular* United States security. *Bersch* v. *Drexel Firestone, Inc.*, 519 F.2d 974, 989 (2d Cir.), *cert. denied sub nom. Bersch* v. *Arthur Andersen & Co.*, 423 U.S. 1018 (1975).

Examination of Section 18 of the *Restatement (Second) of Foreign Relations Law* thus leads to precisely the same result as application of the precise statutory language: to satisfy the fundamental requirement of the Act, the effect in the United States must be direct. Any perceived theoretical concerns about New York's role as an international payments center do not suffice. Congress did not design the FSIA to "open up our courts to all comers," or to permit our courts to adjudicate every controversy that might have any conceivable

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26 *See also, e.g., Continental Grain Pty., Ltd.* v. *Pacific Oilseeds, Inc.*, 592 F.2d 409, 416-17 (8th Cir. 1979); *Schoenbaum* v. *Firstbrook*, 405 F.2d 200, 206-09 (2d Cir.) *rev'd on other grounds*, 405 F.2d 215 (2d Cir. 1968) (*en banc*), *cert. denied sub nom. Manley* v. *Schoenbaum*, 395 U.S. 906 (1969).

consequence within our borders. The Second Circuit's jurisdictional analysis, however, would do just that.

D. Congress Intended To Place Foreign Sovereigns On An Equal Footing With Private Parties In Terms Of Jurisdiction

Beyond this threshold analysis, it is clear that in enacting the FSIA Congress sought to place foreign sovereign governments and instrumentalities on an equal footing, as defendants, with private parties under traditional principles of "long arm jurisdiction." *See, e.g., House Hearings, supra,* at 31, 36 (testimony of Bruno A. Ristau). *See also Texas Trading,* 647 F.2d at 313; *Restatement (Third) of the Foreign Relations Law of the United States* § 453 cmt. c (1987) ("A court in the United States will not adjudicate a claim against a foreign state (or state instrumentality) that would not be subject to adjudication if the defendant were a foreign non-governmental enterprise."). It is accordingly pertinent—and indeed required—in construing the direct effect, long-arm clause in this case, to look at how similar claims are dealt with in cases involving non-sovereign parties.

The paradigm case is one in which a borrower, without leaving its own state, enters into a transaction with a lender from another state, payable at the lender's place of business, and the lender subsequently attempts to sue the borrower in the state of lender's place of business.[27] As summarized in the leading work on jurisdiction of courts in the United States, Robert C. Casad, *Jurisdiction in Civil Actions,* § 8.02 (2d ed. 1991), when a note is executed outside the forum state but payable in the forum state, the prevailing view is that long-arm jurisdiction is present over the maker of the note only when the underlying transaction also had a significant forum

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27 This statement of the paradigm case is significantly more favorable to the exercise of jurisdiction than the case before the Court, because here the holders of the Bonods seek to bring suit not at their place of business, but at an optional place of payment with which they have no other connection. The analogy also is more favorable to the Respondents than the case before the Court because, as discussed earlier, Petitioners did not "borrow" money.

state connection.[28] When the note is executed outside the forum state and the transaction had no significant connection to the forum state, the prevailing view has been that the fact that the note is payable in the forum state, without more, is not sufficient to support long-arm jurisdiction over the maker.[29]

A great number of decisions, by both state and federal courts, support these conclusions.[30] The courts so hold whether the defendant was domiciled or established in a state of the United States other than the putative forum or in a foreign country. For instance, in *Floyd J. Harkness Co.* v. *Amezcua*, 60 Cal. App. 3d 687, 131 Cal. Rptr. 667 (5th Dist. 1976), plaintiff had advanced funds from California to defendant against promissory notes issued in Mexico. When defendant failed to pay the notes as they came due, plaintiff brought suit in California, serving defendant in Mexico. Both the superior court and the court of appeal denied jurisdiction. The court of appeal listed three contacts: (1) plaintiff's acts of advancing funds from California; (2) the designation of California as the place of payment; and (3) numerous telephone conversations with defendant to and from California. "To predicate jurisdiction on contacts as tenuous as those here," the court of appeal said, "would not only offend traditional notions of fair play and substantial justice but would be unreasonable." 60 Cal. App. at 691, 131 Cal. Rptr. at 669.[31]

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28 *See, e.g., Schwegmann Bank & Trust Co.* v. *Simmons*, 880 F.2d 838 (5th Cir. 1989); *First City Fed. Sav. Bank* v. *Dennis*, 680 F. Supp. 579 (S.D.N.Y. 1988); *National Credit Union Admin. Bd.* v. *Christenson*, 627 F. Supp. 381 (E.D. Mo. 1986) (all containing numerous transaction-related contacts with the forum in addition to note payable to forum resident).

29 *See, e.g., Plaza Realty Investors* v. *Bailey*, 484 F. Supp. 335 (S.D.N.Y. 1979); *Fourth Northwestern Nat'l Bank* v. *Hilson Indus., Inc.*, 117 N.W.2d 732 (Minn. 1962); *Buck* v. *Heavner*, 377 S.E.2d 75 (N.C. App. 1989).

30 *See* Casad, *supra*, § 8.02 at 8-38 n.98.

31 Note that in the present case, only the second of the three contacts listed is present.

Again, in *Atlantic Fin. Fed.* v. *Bruno*, 698 F. Supp. 568 (E.D. Pa. 1988), defendants, residents of Alaska, agreed in Alaska to invest in an energy project in California. The promoters of the project agreed to arrange for financing, and arranged for a loan to defendants from a Pennsylvania bank. Defendants executed a note providing for payments at the bank's office near Philadelphia, and for a time they made payments to that office. When the project failed, defendants stopped paying on their note. The bank brought suit in Pennsylvania, and the court dismissed. "The mere entering into a contract by a party in Alaska with a bank in Pennsylvania," the court wrote, "does not constitute sufficient contacts to establish personal jurisdiction." 698 F. Supp. at 572.

To cite only one more out of a long line of cases, in *Glass* v. *Harris*, 687 F. Supp. 906 (S.D.N.Y. 1988), defendants, residents of Louisiana, executed a note in favor of plaintiff, a resident of New York, payable in New York on demand. The underlying transaction concerned real estate in Louisiana, but in fact the operative check had been delivered in New York. Eventually the transaction fell through, and plaintiff brought suit in New York. The court dismissed the action for want of jurisdiction:

> [Plaintiff] relies on . . . cases in which courts from this Circuit have found personal jurisdiction over defendants who had executed promissory notes outside New York that were payable in New York. However, . . . in each of these cases the court relied upon significant additional contacts between the defendant and New York to overcome the general rule that a promissory note made payable in New York cannot alone subject the borrower to personal jurisdiction in New York.

687 F. Supp. at 908-09 (citations omitted). In both *Atlantic* and *Glass*, unlike this case, both the place of payment *and* the plaintiff were located in the forum, yet the forum con-

tacts still were insufficient to support jurisdiction over the foreign defendants.[32]

Professor Casad summarized the relevant legal principles as follows:

> In actions arising from loan transactions, whether the defendant is the borrower, the lender, or a loan broker, the questions that appear to be the most significant in determining whether long-arm jurisdiction is proper are (1) whether the defendant physically entered the forum state in the process of forming the transaction; (2) whether the loan was designed to finance a project with significant forum state connection; (3) whether the loan was secured by property in the forum state; (4) where the loan was delivered to the borrower; and (5) where the payments were to be made. The cases in which long-arm jurisdiction has been upheld usually involve a combination of these factors, so it is not possible to conclude that any one of them alone would be sufficient.

Casad, *supra*, at § 8.03.

If one were to treat the Bonods as loan transactions, applying these tests, factors (1), (2), (3), and (4) are clearly absent. Factor (5) is present, as one of four options for the holder, not accompanied by any forum selection or choice of law clause. Casad lists no case, however, in which factor (5) standing alone—the place of payment of a debt—supported jurisdiction of the forum state.

E. Extension Of The FSIA To Reach Petitioners' Conduct In This Case Would Exceed Constitutional Due Process Limits

That the Act does not reach Petitioners' conduct in this case is clear not only from the language of the statute and the legislative history, but for another reason as well: were

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32 It also is significant that in each of the cases analyzed by Casad in which place of payment plus one or more of the other listed factors supported jurisdiction, the plaintiff also was a resident of the forum state.

the Act construed to extend jurisdiction to Petitioners' conduct at issue here, it clearly would run afoul of the due process limits of the Constitution.[33] Indeed, in their discussion of jurisdiction under the Act, the drafters of the FSIA expressly incorporated constitutional due process concerns, and specifically referenced the Court's precedent in this area. *See House Report*, *supra*, at 13 ("The requirements of minimum jurisdictional contacts and adequate notice are embodied" in the Act) (citing *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945); *McGee* v. *International Life Ins. Co.*, 355 U.S. 220, 223 (1957)). Fifty years of the Court's jurisprudence in this area confirms that in this case Petitioners' relevant contacts with the forum are too insubstantial to survive constitutional scrutiny as a jurisdictional predicate, and thus Congress could not have intended them to satisfy the "direct effect" requirement of the FSIA.

In order for a court to exercise jurisdiction over a nonresident defendant within the limits imposed by the Constitution, the defendant must have certain "minimum contacts" with the forum state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe*, 326 U.S. at 316 (quoting *Milliken* v. *Meyer*, 311 U.S. 457, 463 (1940)). The Court has consistently held that this standard mandates jurisdictional contacts through which the nonresident defendant "purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958); *see also Kulko* v. *California Superior Court*, 436 U.S.

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33 Under the Act's unique structure it is clear that the foreign sovereign's contacts with the forum which give rise to the cause of action—traditionally concerns of personal jurisdiction—and the determination of the permissible reach of the Act—traditionally subject matter concerns—are inextricably intertwined. *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 485 n.5, 489 n.14 (1983). This issue is before the Court only as an aid in interpreting the direct effect requirement of the Act. Whether there is a constitutional basis for personal jurisdiction over Petitioners is not before the Court as an independent question.

84, 93-94 (1978); *Shaffer* v. *Heitner*, 433 U.S. 186, 216 (1977).

Based on that standard, the mere foreseeability of being subjected to the legal process of the forum is an insufficient ground to support jurisdiction. *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 295-97, (1980); *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 475 (1985). Moreover, because the constitutional basis for jurisdiction must rest on the purposeful acts of the defendant, the Court has made it clear that the unilateral actions of a plaintiff—whether foreseeable or not—also are an insufficient basis upon which to exercise jurisdiction over a nonresident defendant. *Hanson*, 357 U.S. at 253; *see also Kulko*, 436 U.S. at 93-94.[34] It is clear that the Act could not reach this case and still be within constitutional bounds, because the Respondents' act of calling for payment in New York, even when combined with Argentina's prior knowledge that they could do so, does not supply the necessary contact with the forum upon which jurisdiction can rest.

Even where the defendant itself has approached the forum in some manner, an attenuated contact, such as that present here in the form of listing New York as a possible place of payment, will not suffice as a jurisdictional predicate. *Burger King*, 471 U.S. at 475. The dispute in *Burger King* arose out of a Michigan resident's alleged breach of a franchise agreement with a Florida corporation, and the corporation sued in Florida. The Court found that the exercise of jurisdiction over the defendant in Florida was consistent with due process, because the "dispute grew directly out of 'a contract which had a *substantial* connection with that State.' " *Id.* at

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34 Indeed, if foreseeability were a "sufficient benchmark" for personal jurisdiction under the Constitution, the Court has suggested, its holdings in *Hanson*, 357 U.S. 235, and *Kulko*, 436 U.S. 84, would have been different. *World-Wide Volkswagen*, 444 U.S. at 295-296. Surely, the Court has observed, it was foreseeable in *Hanson* that the settlor of a Delaware trust would later move to Florida; and it was no doubt foreseeable in *Kulko* that an ex-wife would move to California to be joined there later by her minor daughter. *Id.* at 296. Nevertheless, the Court in both cases found minimum contacts lacking.

479 (quoting *McGee*, 355 U.S. at 223 (emphasis in *Burger King*)). The facts in *Burger King* are a good illustration of the types of contacts necessary to meet this test: in addition to causing the alleged injury in Florida, the defendant engaged in extensive negotiations with the Miami headquarters of Florida-based Burger King, and entered into a contract which (a) provided that the agreements were made in and to be enforced from Miami, (b) provided for the continuing supervision of the defendant by the Florida headquarters and (c) provided that all disputes would be governed by Florida law. *Burger King*, 471 U.S. at 479-81.[35]

This "substantial connection" analysis was reaffirmed two years later in *Asahi Metal Industry Co.* v. *California Superior Court*, 480 U.S. 102 (1987). Citing *Burger King* and *McGee*, Justice O'Connor stated that

> "[t]he 'substantial connection' between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State*.[36]

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35 While it is not inconceivable that a single forum act might, under certain circumstances, create a "substantial connection" so as to support the assertion of jurisdiction, a contract between an in-state resident and a foreign party, standing alone, cannot. *Burger King*, 471 U.S. at 478 (1985). Although this Court's decision in *McGee*, 355 U.S. 220, permitted the assertion of jurisdiction in California over a Texas corporation for a suit "based on a contract which had a substantial connection" with California, *id.* at 223, jurisdiction in *McGee* rested not merely on the existence of the contract, but also on the facts that the defendant corporation delivered the contract in California, received premium payments mailed from California, and the insured was a resident of California when he died. *Id.* In addition, the Court noted that California had an interest in "providing effective means of redress for its residents." *Id.*

36 Chief Justice Rehnquist, and Justices Powell and Scalia also endorsed this view. *Asahi*, 480 U.S. at 108-113 (1987). All nine Justices agreed that the exercise of jurisdiction over Asahi would violate due process, *id.* at 105-108, but four Justices—Justices Brennan, White, Marshall and Blackmun—rested their decision solely on the analysis of reasonableness also put forth by Justice O'Connor. *Id.* at 116-121.

Id. at 112 (emphasis in original) (citations omitted). Relying on this now established principle, four Justices in *Asahi* found that mere awareness on the part of Asahi that its components, manufactured and sold outside the United States, would reach a California market did not constitute a substantial connection so as to permit the exercise of personal jurisdiction over Asahi by the California courts. *Id.* at 112, 113.

While this case falls somewhere between *Burger King* and *Asahi*, it is much closer to the latter. It clearly lacks the substantial connection with this country required as a constitutional minimum for jurisdiction. The multiplicity of purposeful contacts that the defendant had with the forum in *Burger King* are not present in this case. To the extent that the *Asahi* defendant's awareness that its product would likely come to rest in California is not an adequate contact with the forum state for jurisdictional purposes, neither can the Petitioners' awareness that New York might be chosen as the place of payment from among the listed options of New York, Zurich, London or Frankfurt substitute for the requisite minimum contact here.[37]

For all of these reasons, jurisdiction over this action does not lie under the FSIA. Congress determined that the jurisdiction of the United States courts cannot be extended to foreign sovereigns except under the exceptions set forth in the Act. The language and structure of the Act, and its inherent constitutional limitations, compel the conclusion that Peti-

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37 This is especially true because, while residence of the plaintiff in the forum is not a requirement for the assertion of jurisdiction over a foreign defendant, *see Perkins* v. *Benguet Consol. Mining Co.*, 342 U.S. 437 (1952), it is not irrelevant to the jurisdictional inquiry. *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770, 780 (1984). While the plaintiff's lack of contacts with the forum ordinarily will not defeat otherwise proper jurisdiction, they may be so important as to permit jurisdiction where it would not otherwise exist. *Calder* v. *Jones*, 465 U.S. 783, 788 (1984). This case presents the unusual circumstance where the opposite may be true: to the extent that Congress crafted the direct effect basis of jurisdiction to take the plaintiff's contacts into account—*i.e.*, by focusing on where the plaintiff's injury is felt—a key requisite for jurisdiction is missing where, as in this case, even the plaintiff's contacts with the forum are minimal.

tioners' failure to pay Respondents, foreign corporations with no connection with this country other than their requests to be paid here, is an insufficient nexus with this country to support jurisdiction of this action.

CONCLUSION

For the reasons set forth above, the decision of the court of appeals should be reversed, and the Complaint in this action should be dismissed.

Respectfully submitted,

STEVEN ALAN REISS
BONNIE GARONE
ALLISON COREY MILLER
KENNETH L. METZNER
Weil, Gotshal & Manges
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

RICHARD J. DAVIS
Counsel of Record
Weil, Gotshal & Manges
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

ANDREAS F. LOWENFELD
40 Washington Square South
New York, New York 10012
(212) 998-6208

Attorneys for Petitioners